

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 WESTERN WASHINGTON REGION
3 STATE OF WASHINGTON
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5
6 C. DEAN MARTIN,

7 Petitioner,

8
9 v.

10 WHATCOM COUNTY,

11
12 Respondent.
13

CASE NO. 11-2-0002

ORDER FINDING COMPLIANCE

14 THIS Matter came before the Board on December 14, 2011, following the submittal of
15 Whatcom County's Compliance Report in response to the Board's July 22, 2011 Final
16 Decision and Order (FDO) which found a portion of Whatcom County Ordinance No. 2010-
17 065 to be non-compliant with the Growth Management Act (GMA).
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19 The Board held a telephonic compliance hearing that day attended by Board members
20 James McNamara, Nina Carter and William Roehl with Mr. McNamara presiding. Whatcom
21 County (County) was represented by Karen Frakes. The Board was informed that Petitioner,
22 Mr. Martin, recently was involved in an accident which proved fatal. However, no objection
23 had been filed by Petitioner prior to the time of his demise. The hearing necessarily
24 proceeded without Petitioner. Subsequent to the compliance hearing, the Board received
25 correspondence regarding Mr. Martin from Tom Ehrlichman and Barbara Dykes, his former
26 attorneys in a separate Board matter. That letter is appended to this Order in testament to
27 Mr. Martin and the valuable service he provided to the people of Whatcom County
28 advocating on behalf of the preservation of agricultural lands.
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I. BURDEN OF PROOF

After the board has entered a finding of non-compliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance. RCW 36.70A.300(3)(b).

After the period for compliance has expired, the board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and (2). For purposes of board review of the comprehensive plans and development regulations adopted by local governments in response to a non-compliance finding, the presumption of validity applies and the burden is on the challenger to establish that the new adoption is clearly erroneous. RCW 36.70A.320(1), (2) and (3). If a finding of invalidity has been entered, the burden is on the local jurisdiction to demonstrate that the ordinance or resolution it has enacted in response to the finding of invalidity no longer substantially interferes with the goals of the GMA. RCW 36.70A.320(4).

In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993). Within the framework of state goals and requirements, the boards must grant deference to local governments in how they plan for growth:

In recognition of the broad range of discretion that may be exercised by counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter, the legislature intends for the boards to grant deference to the counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community. RCW 36.70A.3201 (in part).

In sum, the burden is on the Petitioner to overcome the presumption of validity and

1 demonstrate that any action taken by the County is clearly erroneous in light of the goals
2 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
3 Where not clearly erroneous and thus within the framework of state goals and requirements,
4 the planning choices of the local government must be granted deference. In this case, no
5 objection to a finding of compliance has been filed.
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7 **II. ISSUE TO BE DISCUSSED**

8 Whether Whatcom County has achieved compliance with regard to that aspect of its zoning
9 found to be out of compliance with the Growth Management Act (GMA) in the Board's July
10 22, 2011 FDO?
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12 **III. DISCUSSION**

13 The Board found one aspect of Ordinance 2010-065 that did not comply with the GMA.
14 The Board concluded the Petitioner carried his burden of proof in demonstrating the
15 County's action in the adoption of Ordinance 2010-065 was inconsistent with the Whatcom
16 County Comprehensive Plan. The Board found a rezone of 92 acres in a floodplain from
17 R10A to R-5A, a doubling of allowed density, was inconsistent with Whatcom County
18 Comprehensive Plan Goal 2K which provides: "Discourage development in areas prone to
19 flooding" and inconsistent with Policy 2K-1 which provides: "Limit land in one-hundred year
20 floodplains to low-intensity land uses such as open space corridors or agriculture."
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22 The County states in its Compliance Report that it adopted Ordinance No. 2011-041 on
23 October 11, 2011 which rezoned approximately 98 floodplain acres of the 770 acres
24 originally rezoned by Ordinance 2010-065 from R5A back to R10A. This action complies
25 with the Board's order and, as found in County Ordinance 2011-041, Finding of Fact #17 will
26 discourage development in areas prone to flooding and will limit development in the
27 floodplain to low-intensity land uses in accordance with Goal 2K and Policy 2K-1.
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1 IV. ORDER

2 The Board finds that Whatcom County has achieved compliance with the GMA by its action.
3 Therefore, the Board enters a finding of compliance and this case is closed.
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5 Dated this 22nd day of December, 2011.
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7 _____
James McNamara, Board Member

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9 _____
10 William Roehl, Board Member

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12 _____
13 Nina Carter, Board Member
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15 This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a
16 motion for reconsideration pursuant to WAC 242-03-830.¹
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24 ¹Reconsideration. Pursuant to WAC 242-03-830, you have ten (10) days from the date of mailing of this Order to
25 file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any
26 argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original
27 and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of
28 record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-03-240(1).
29 The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

30 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior court as
31 provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior
32 court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.
The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the
Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW
34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means
actual receipt of the document at the Board office within thirty days after service of the final order. A petition for
judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

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December 22, 2011

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